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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Appellant,

v.

DAVID MUNIZZA,

Defendant and Respondent.

D048453

(Super. Ct. No. SRD05041)

APPEAL from an order of the Superior Court of San Diego County, David M. Gill, Judge. Reversed.

David Munizza, a person twice convicted of a felony in this state, petitioned the Superior Court of San Diego County for a certificate of rehabilitation and pardon pursuant to Penal Code<sup>1</sup> sections 4852.01 and 4852.06. The district attorney opposed the petition, arguing Munizza was ineligible because he is not a resident of California and because he had not resided in this state for the period after discharge from parole required

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

by the sections. The trial court found the residency requirements unconstitutional as violative of Munizza's right to equal protection of the law and his right to travel. The trial court granted the certificate of rehabilitation. The district attorney appeals.<sup>2</sup>

### BACKGROUND

Munizza was convicted in June 1993 and again in March 1994 of possession of methamphetamine for sale. He served a concurrent term of imprisonment on the convictions and was released on parole in 1995 and was discharged from parole in 1998.

In August 2005 Munizza petitioned the San Diego County Superior Court pursuant to sections 4852.01 and 4852.06 for a certificate of rehabilitation. In that petition he stated he was not a resident of California and had not continuously resided in California from May 15, 2000, to the date of the petition.

Attached to the petition were points and authorities arguing the requirement for the grant of a certificate of rehabilitation that he reside in California for five years before filing the petition (§ 4852.06) and the requirement for a seven-year period of rehabilitation while a resident of this state were unconstitutional as violative of his constitutional rights to equal protection of the law and the right to travel (§ 4852.03, subd. (a)(3)).

The trial court agreed, ordered the district attorney to prepare reports on the petition and after a hearing granted Munizza a certificate of rehabilitation.

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<sup>2</sup> The request filed January 26, 2007, that this court take judicial notice of five documents relevant to the legislative history of section 4852.01 et seq. is granted.

## DISCUSSION

The district attorney argues the trial court erred in finding the residence requirements of sections 4852.01 and 4852.06 unconstitutional as a denial of equal protection of the law and the right to travel.

### *A. Pardons*

The state Constitution gives the Governor the power to grant pardons. (Cal. Const., art. V, § 8, subd. (a).) The Penal Code provides two systems for seeking that pardon.

#### *1. Direct Application to the Governor*

Direct application for a pardon may be made to the Governor. On receipt the Governor transmits the application to the Board of Prison Terms for a full investigation and recommendation. (§§ 4802-4803, 4812-4813.) The power of the Board of Prison Terms to investigate the application is wide, including the power to hear testimony. (§ 4812.) In the case of a twice-convicted felon, no pardon may be granted except on recommendation of four justices of the California Supreme Court. (Cal. Const., art. V, § 8, subd. (a).) The Penal Code makes provision for referral of the matter to the Supreme Court for its recommendation after the Board of Prison Terms has conducted its investigation. (§§ 4850-4852.)

#### *2. Certificate of Rehabilitation*

During the Second World War in response to a high number of direct pardon applications to the Governor, the Legislature created a certificate of rehabilitation

procedure to allow the superior court to investigate and recommend pardon applications. (*People v. Ansell* (2001) 25 Cal.4th 868, 874-875.)

Generally, the certificate is available to felons who have completed their sentences and who have undergone an additional and sustained "period of rehabilitation" in California. (§ 4842.03, subd. (a).) The procedure provides a minimum requirement of five years' residence in this state, plus an additional residence period of from two to five years depending upon the nature of the conviction. (§§ 4852.01, subds. (a)-(c); 4852.03, subd. (a); 4852.06.) During the period of rehabilitation the person must display good moral character and must have acted in an honest, industrious and law-abiding manner. No petition for a certificate of rehabilitation may be filed until the time and residency requirements of the code are satisfied. (§§ 4852.01, subds. (a)-(c); 4852.03, subd. (b); 4852.06.)

When the application is filed, the superior court holds a hearing and considers evidence relevant to the petition. (§§ 4852.1, 4852.11.) If the court finds the petitioner is both rehabilitated and fit to exercise rights and privileges lost by reason of the conviction, it enters an order in the form of a certificate of rehabilitation. (§ 4852.13, subd. (a).) That order is transmitted to the Governor as a recommendation that a pardon be granted and to other institutions as required. (§§ 4852.13, subd. (a); 4842.14.)

#### *B. Discussion*

Munizza petitioned the superior court for a certificate of rehabilitation conceding he did not qualify under the applicable statutes for such a certificate because he had not been a resident of this state for the required number of years after his discharge from

parole. He argued, however, the residency requirements violated his constitutional right to travel under the immunities and equal protection clauses of the United States Constitution (U.S. Const., art. IV, § 2 and 14th Amend.) and that the trial court should disregard the residency requirements in reviewing his petition. The trial court agreed and granted the certificate of rehabilitation.

Following the trial court's decision in this case, the Court of Appeal in *People v. Parker* (2006) 141 Cal.App.4th 1297 addressed the same arguments raised by Munizza below. The court in *Parker* concluded the residency requirements for the grant of a certificate of rehabilitation did not violate the constitutional right to travel or deny equal protection of the law. Munizza argues *Parker* was wrongly decided. We have reviewed *Parker* and conclude it properly resolves the issues in this case. We briefly set out *Parker's* reasoning and reverse the trial court's order granting Munizza a certificate of rehabilitation.

The court in *Parker* reviewed the United States Supreme Court's decision in *Saenz v. Roe* (1999) 526 U.S. 489 [119 S.Ct. 1518], dealing with the constitutional right to travel. *Saenz* stated the right to travel actually involves three rights: (1) the right of a citizen of one state to enter and leave another state; (2) the right to be treated as a friendly visitor and not an unfriendly alien when temporarily in a state; and (3) for those visitors who elect to become permanent residents, the right to be treated like other citizens in the state. (526 U.S. at p. 500.)

The court concluded that because Parker was not a resident of California at the time he sought the certificate of rehabilitation, none of the rights identified in *Saenz* were

offended by the residency requirements for the grant of such a certificate. The *Parker* court concluded Parker's argument was based on the claim the right to travel involved not only the right to enter a state but also the right to leave it. Parker argued the residency requirements impeded his right to leave California and live in another state. This, Parker argued, had the effect of "[creating] an impermissible distinction between ex-felons who leave the state after completion of their sentences and ex-felons who remain in California." (*People v. Parker, supra*, 141 Cal.App.4th at p. 1306.)

The court in *Parker* rejected the argument, stating the subject residency requirements did not affect Parker's right to leave California. The court characterized Parker's argument this way: "Parker is contending that, as a former California resident, he carried California rights with him when he left the state, and can assert those rights with him when he left the state, and can assert those rights as a former resident. Parker claims the right to travel preserves the right of an individual who emigrates from a state to utilize statutory procedures provided by that state on equal terms as current residents." (*People v. Parker, supra*, 141 Cal.App.4th at p. 1307.)

The court rejected the argument, saying: "This position is contrary to relevant legal authority. The obligations imposed on a state to treat temporary visitors without discrimination and grant prompt recognition to a newly arrived resident do not impose a reverse obligation on a state to continue to care for its former residents. [Citations.]" (*People v. Parker, supra*, 141 Cal.App.4th at p. 1307.)

The court in *Parker* stated even if it treated, as Parker argued it should, his claimed deprivation of rights as coming under a right analogous to the second travel right

identified in *Saenz*, i.e., the right to be treated as a friendly visitor and not an unfriendly one when temporarily in a state, it would still reject his claim. The court noted that right prohibits discrimination against a citizen of another state where there is no "substantial reason" for the discrimination beyond the fact that they are citizens of another state.

(*People v. Parker, supra*, 141 Cal.App.4th at p. 1308.)

The court noted, however, that equal treatment of residents and nonresidents is required under the second class of travel rights only when the privileges and immunities involved bear "'upon the vitality of the Nation as a single entity . . . .' [Citation.]"

(*People v. Parker, supra*, 141 Cal.App.4th at p. 1308.) What is not permitted are distinctions that hinder the formation, purpose, or development of a single union of states, not distinctions that merely reflect the fact that the nation is composed of states. Because Parker was not asserting a claim bearing on those interests, the "substantial reason" test general applicable to the second class of travel rights identified in *Saenz* did not apply.

(*Id.* at pp. 1308-1309.)

The court concluded, therefore, the residency requirements for the grant of a certificate of rehabilitation were reviewable under the "rational basis" test utilized in equal protection cases that do not involve fundamental rights or suspect classifications.

(*People v. Parker, supra*, 141 Cal.App.4th at p. 1309.)

The court found a rational basis for the residency requirements. It found that California has a compelling interest in granting certificates of rehabilitation only to deserving individuals and requiring a significant period of residency in California bears a rational and legitimate relationship to achieving that goal. The court noted that while

official records concerning a petitioner's arrests or incarcerations in another state might be available to California authorities, California was also reasonably interested in a wide range of materials and evidence dealing more subtly with the petitioner's character. The Legislature has made the determination such materials and evidence are effectively discovered if the petitioner has been in this state during the period of rehabilitation.

(*People v. Parker, supra*, 141 Cal.App.4th at p. 1310.)

The court in *Parker* stated: "The Legislature could reasonably conclude that the residency requirement substantially increases the likelihood that law enforcement and the court will be alerted to facts that cast doubt on a person's qualification for a certificate of rehabilitation." (*People v. Parker, supra*, 141 Cal.App.4th at p. 1310.)

We agree. The trial court erred in finding Munizza's constitutional right to travel and to equal protection of the law were violated by the residency requirements necessary for the grant of a certificate of rehabilitation. Munizza must seek his pardon by direct application to the Governor.

The order granting a certification of rehabilitation is reversed.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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McINTYRE, J.